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7 TUCKER, SGT. BERNARD ORTIZ

8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 MIGUEL ORTEGA, BENJAMIN ORTEGA,

13 Plaintiffs,

14 v.

15 CITY OF OAKLAND, OAKLAND POLICE
DEPARTMENT, WAYNE TUCKER, In His
16 Capacity as the Police Chief of the City of
Oakland, RAMON J. ALCANTAR, Individually
17 and in his capacity as a Police Officer for the
City of Oakland, B. ORTIZ, Individually and in
18 his capacity as a Police Officer for the City of
Oakland, DOES 1 THROUGH 200,

19 Defendants.
20

Case No. C-07-02659 (JCS)

**NOTICE OF MOTION AND MOTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO STRIKE
SECOND AMENDED COMPLAINT
NINTH CAUSE OF ACTION**

FRCP 12(f)

Date: August 8, 2008
Time: 9:30 a.m.
Dept.: Courtroom A, 15th Floor
The Honorable Joseph C. Spero

21 TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

22 **PLEASE TAKE NOTICE** that on **August 8, 2008, at 9:30 a.m.** or as soon as the matter
23 may be heard in Courtroom A of the above captioned Court, located at 450 Golden Gate Avenue,
24 15th floor, in San Francisco, California, Defendants CITY OF OAKLAND, et al. will and hereby
25 does move the Court for an order, pursuant to Federal Rule of Civil Procedure 12(f), striking the
26 SECOND AMENDED COMPLAINT 9TH CAUSE OF ACTION in this case.

1 The motion to strike is made on the ground that Plaintiffs improperly added a new cause of
2 action to their second amended complaint without leave of court.

3 This motion is based on this Notice, the accompanying memorandum of points and
4 authorities, request for judicial notice, the court files of this case, and any evidence or argument the
5 Court may entertain at the hearing of this matter.

6 7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 Defendants City of Oakland, Wayne Tucker, and Bernard Ortiz (“Defendants”) hereby
10 submit the following Memorandum of Points and Authorities in Support of their Motion to Strike
11 the Ninth Cause of Action in Plaintiffs’ Second Amended Complaint.

12 13 **II. STATEMENT OF FACTS**

14 On May 18, 2007, Plaintiffs Miguel Ortega and Benjamin Ortega (“Plaintiffs”) filed a
15 Complaint for Damages against defendants Wayne Tucker, Ramon J. Alcantar, City of Oakland and
16 the Oakland Police Department. (Docket Entry No. 1.) Defendant City of Oakland filed a motion to
17 dismiss the complaint pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) for failure to state
18 a claim on June 27, 2007. (Docket Entry No. 5.) On September 7, 2007, Plaintiffs filed a First
19 Amended Complaint for damages against defendants alleging causes of action pursuant to 42
20 U.S.C. §1983 for excessive force in violation of their rights under the Fourth, Fifth and 14th
21 Amendments to the U.S. Constitution, rights to freedom of expression under the First Amendment,
22 rights to privacy and rights to be free from unreasonable searches and seizures under the Fourth
23 Amendment.¹ (See Defendants’ Request for Judicial Notice in Support of Motion to Strike
24 (“RJN”), Exhibit A.)

25
26 ¹ All of these constitutional claims were alleged in the First Cause of Action.

1 The Second Cause of Action alleged a §1983 *Monell* claim seemingly against the City. (Id.)
 2 The Third Cause of Action was for violation of Plaintiffs' rights pursuant to 42 U.S.C. §1981
 3 against the City, Tucker and Alcantar. (Id.) The Fourth Cause of Action was for violation of
 4 California Civil Code §51.7 alleged against Alcantar only. (Id.) The Fifth Cause of Action was for
 5 assault alleged against Alcantar only. (Id.) The Sixth Cause of Action was for Battery alleged
 6 against Alcantar only. (Id.) The Seventh Cause of Action was for Intentional Infliction of
 7 Emotional distress against Alcantar only. (Id.) The Eighth Cause of Action was for Negligence
 8 against Tucker and Alcantar only. And the Ninth Cause of Action was for violation of California
 9 Civil Code §52.1 alleged against Alcantar only.

10 On September 19, 2007, Defendants' filed an Answer to the First Amended Complaint.
 11 (Docket No. 19.) On November 16, 2007, the initial case management conference in the case was
 12 held before the Honorable Judge Spero. (See Docket No. 31.) In his Minute Order, Judge Spero
 13 ordered Plaintiffs to file and serve their first amended complaint² to add only Officer B. Ortiz as a
 14 Defendant in this action. (RJN, Exhibit B.) Accordingly, Plaintiffs filed a Second Amended
 15 Complaint on November 27, 2007. (Docket Entry No. 33; RJN, Exhibit C.) The Second Amended
 16 Complaint was served on Defendants by mail on December 27, 2007.

17 As directed, Plaintiffs added Officer Ortiz as a defendant in the Second Amended
 18 Complaint. (RJN, Exhibit C.) In addition, however, Plaintiffs added an entirely new cause of action
 19 under 42 U.S.C. §1983 for Negligent Selection, Training, Retention, Supervision, Investigation and
 20 Discipline against the City and Tucker.³ (*Id.* at p. 11.) Now, there are ten causes of action instead of
 21 the original nine.

22 _____
 23 ² Defendants believe this reference to a "first amended complaint" in the minute order and in
 24 the corresponding docket entry no. 31 is clerk's typo because the first amended complaint had
 already been filed and answered. What was to be filed by plaintiffs was their Second Amended
 Complaint which is the subject of this motion to strike.

25 ³ It should be noted that this cause of action does not allege violations of any federal
 26 constitutional rights. It is simply brought under §1983 which is not an independent source of relief.
 Rather, it is a vehicle for bringing federal constitutional claims against state actors.

1 Plaintiffs never sought or obtained leave of this court to add a new cause of action. Their
2 instructions were to amend the complaint to add only Officer Ortiz. This newly added cause of
3 action is not even alleged against Officer Ortiz.

4 On January 9, 2008, Deputy City Attorney Charles Vose sent Ms. Catherine Douat, Esq.,
5 then counsel of record for Plaintiffs in this action, an e-mail addressing an issue that a cause of
6 action was improperly added to the Second Amended Complaint. (Declaration of Charles Vose in
7 Support of Defendants' Motion to Strike ("Vose Decl.") at 2:1-3.) Mr. Vose asked Ms. Douat if she
8 would voluntarily dismiss the improper cause of action informing her that otherwise he would be
9 forced to file a Motion to Strike. Ms. Douat responded and volunteered that she would file a Third
10 Amended Complaint deleting the improperly added cause of action if we would stipulate. (Vose
11 Decl. at 2:3-7.)

12 Mr. Vose agreed to the stipulation, and Ms. Douat responded on January 9 that she would
13 file a Third Amended complaint that would be the same as the First Amended complaint (except
14 that it would add Sgt. Ortiz as a defendant). (*Id.* at 2:7-10.) In a string of e-mails between Mr. Vose
15 and Ms. Douat it was agreed that defendants would not have to file an answer to the Second
16 Amended Complaint and instead would file an answer to the Third Amended Complaint. (*Id.* at
17 2:10-12.)

18 Mr. Vose heard nothing more from Ms. Douat on the matter, and no Third Amended
19 Complaint was ever filed. Then, on April 29, 2008, Mr. Vose sent a letter to Mr. Steven R.
20 Jacobsen, Esq., also counsel of record for Plaintiffs in this matter, addressing a number of issues
21 including the issue regarding the improperly added cause of action. (*Id.* at 2:13-16.) In response,
22 Ms. Douat then agreed to file a "corrected copy of the Second Amended Complaint",
23 acknowledging the wrong version of the Second Amended Complaint was filed with the Court. (*Id.*
24 at 2:17-20.)

25 Again Mr. Vose heard nothing further from either Mr. Jacobsen or Ms. Douat. On June 13,
26 2008, he called and left a message with Mr. Jacobsen to discuss the matter. On June 20, 2008, he

1 called Mr. Jacobsen again and finally spoke with him regarding the matter. During that
2 conversation, Mr. Vose was informed that Ms. Douat was no longer associated with his office. Mr.
3 Vose and Mr. Jacobsen discussed the matter and Mr. Jacobsen indicated he would need an
4 opportunity to review the file. (*Id.* at 2:21-26.) Mr. Vose e-mailed Mr. Jacobsen the April 29, 2008
5 letter and some of the above mentioned e-mail correspondence between him and Ms. Douat. (*Id.* at
6 2:26-3:2.)

7 On June 24, 2008, Mr. Vose again called Mr. Jacobsen to discuss the matter. Mr. Jacobsen
8 acknowledged he had never seen the April 29, 2008 letter and agreed to dismiss the Ninth Cause of
9 Action in the Second Amended Complaint. He stated he would do so that week. Mr. Vose agreed
10 that he would then immediately file an answer for all defendants that he represented. (*Id.* at 3:3-7.)

11 On June 25, 2008, Mr. Vose received a letter from Ms. Brenda Posada, newly associated
12 with Mr. Jacobsen's office. In her letter she refused to dismiss the Ninth Cause of Action in the
13 Second Amended Complaint. On June 26, 2008, Ms. Posada and Mr. Vose discussed the issue
14 further. Mr. Vose reiterated that the Ninth Cause of Action was added improperly and repeated his
15 request that her office dismiss that cause of action. She agreed to look at the file and said she
16 would get back to him. (*Id.* at 3:8-13.)

17 On June 27, 2008, Mr. Vose received a letter from Ms. Posada, again refusing to dismiss the
18 Ninth Cause of Action. Now Defendants are filing an Answer to all but the Ninth Cause of Action
19 in the Second Amended Complaint. Defendants intent to separately seek sanctions against
20 Plaintiffs' attorneys for the maintaining the improperly added cause of action and bad faith conduct
21 that served only to unreasonably multiply these proceedings. Discovery closed in this case on July
22 1, 2008.

23 III. LEGAL DISCUSSION

24 A. Plaintiffs' Ninth Cause of Action added without leave of this court should be 25 stricken.

26 The court may strike from a pleading any redundant, immaterial, impertinent, or scandalous

1 matter either on its own or on motion made by a party before responding to the pleading. FRCP
 2 12(f). While a motion to strike can be used to attack an entire pleading, it is more often used to
 3 attack portions thereof. See *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on
 4 other grounds in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534-535 (1994). Except for amendments
 5 made "of course" or pursuant to stipulation, leave of court is required to amend a pleading. FRCP
 6 15(a)(2); Shwarzer, Tashima and Wagstaffe, *Federal Civil Procedure Before Trial* 8:399. An
 7 amended pleading filed without leave of court generally has no legal effect. *Federal Civil*
 8 *Procedure Before Trial* 8:399 citing *United States ex rel. Mathews v. HealthSouth Corp.*, 332 F.3d
 9 293, 295-296 (5th Cir. 2003).

10 Since Plaintiffs have already used their "of course" amendment, they were required to seek
 11 leave of court to add a new cause of action in their second amended complaint. They had been
 12 given leave ONLY to add defendants Ortiz as a defendant. Therefore, the addition of the new cause
 13 of action without leave of court to do so violates Rule 15, and it should be stricken accordingly.

14 **B. Plaintiffs' improperly added new cause of action is prejudicial to Defendants**
 15 **because the case has been pending for over a year and Defendants have had no**
 16 **opportunity to conduct discovery as to the new cause of action and discovery is**
 17 **closed.**

18 Although defendants are not required to show prejudice (*Fantasy, Inc., supra* at 1528),
 19 defendants would nevertheless like to point out that not only was the new cause of action
 20 improperly added without leave of court, allowing it to remain in the amended complaint will
 21 greatly prejudice defendants.

22 Defendants have not worked on a defense to the new cause of action because it has been
 23 acknowledged by the parties that it was improperly added, and Plaintiffs have represented for the
 24 last six months that they intended to remove it voluntarily. In doing so, Plaintiffs agreed that
 25 Defendants did not need to file an answer to the Second Amended Complaint because they would
 26 file a corrected Second Amended Complaint or a Third Amended Complaint with that cause of
 action removed. This case has been pending for over a year and discovery is now closed. Therefore,

1 if the court denies this motion, Defendants' defense of this case before trial will be severely
2 prejudiced.

3 Plaintiffs had months to correct their error and seek leave from this court to allege a new
4 cause of action, but they failed to do so. Instead, they lulled defendants into a false sense of security
5 by repeatedly leading them to believe that they would correct the error voluntarily and then sent a
6 letter reneging on their agreement four days before the close of discovery. The improper
7 amendment is also prejudicial because of the expense of responding to the amended pleading and
8 the delay it will create in getting to trial. This is unconscionable behavior that should not be
9 rewarded to the detriment of defendants.

10 **C. This court can strike any portion of Plaintiffs' pleading on its own motion at**
11 **any time.**

12 Rule 12(f) specifically authorizes the court to strike a pleading or any portion thereof on its
13 own motion at any time. FRCP 12(f)(1); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836,
14 841 (10th Cir. 2005).

15 Accordingly, Defendants respectfully request this court to strike the Ninth cause of action
16 on its own motion if, for any reason, it is not inclined to do so pursuant to defendants' motion.

17 **IV. CONCLUSION**

18 For the reasons set forth above, the Ninth Cause of Action in the Second Amended
19 Complaint should be stricken.

20 Dated: July 1, 2008

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22 RANDOLPH W. HALL, Assistant City Attorney
23 JAMES F. HODGKINS, Supervising Trial Attorney
24 CHARLES E. VOSE, Senior Deputy City Attorney
25 KANDIS A. WESTMORE, Deputy City Attorney

26 By: /S/ KANDIS A. WESTMORE
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